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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAMES VICTOR ZUNIGA, Defendant and Appellant.	2d Crim. No. B184625 (Super. Ct. No. 2004041759) (Ventura County)

James Victor Zuniga appeals a judgment following conviction of unlawfully taking or driving a vehicle, with findings of a prior strike conviction and service of two prior prison terms. (Veh. Code, § 10851, subd. (a); Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), & 667.5, subd. (b).)[1]

FACTS AND PROCEDURAL HISTORY

On the morning of October 4, 2004, Kenneth Harley parked his 1992 Ford Taurus station wagon along MacMillan Avenue in Ventura and left the keys in the ignition. Around noon that day, Harley reported the station wagon stolen. The vehicle contained a "Lo-Jack" transponder, allowing it to be found when the transponder is remotely activated.

[1] All further statutory references are to the Penal Code unless stated otherwise.

Later that day, California Highway Patrol Investigator George Orozco activated the transponder and located the station wagon in a drug store parking lot. Francisco Ledesma sat in the front passenger seat. Orozco, accompanied by two other plainclothes officers, parked nearby in an unmarked vehicle.

Within a short time, Zuniga and a woman entered the station wagon. A security officer appeared and "jump-started" the station wagon. Zuniga then drove toward an alley behind the drug store. Orozco followed and requested that Ventura Police detain Zuniga.

Zuniga stopped the station wagon. Orozco stopped his vehicle, and marked Ventura Police vehicles stopped behind him and in front of Zuniga. Zuniga left the station wagon and was "looking around." He stood near a high brick wall at the end of the alley.

Highway Patrol Officer Justin Love arrested Ledesma and Zuniga and placed them in a patrol car containing a hidden tape recorder. While police officers were outside, Ledesma and Zuniga discussed the theft of the station wagon. Zuniga stated: "[W]e should've just parked it there on the next block and just left it . . . I need the charges off . . . I was thinking about jumping the fence . . . . [T]ell them the truth. We wanted . . . to ride around. . . . A joy . . . ride isn't as bad as . . . a GTA. We fucked up by parking back here." The prosecutor played the recording at trial.

Harley did not know Zuniga and had not given him permission to drive the station wagon.

At trial, Ledesma testified that he had stolen the station wagon and that Zuniga was unaware that it was stolen. He stated that he asked Zuniga to drive the vehicle because he did not feel well. Ledesma testified that he pleaded guilty to the unlawful taking or driving of a vehicle.

The jury convicted Zuniga of the unlawful taking or driving of a vehicle. (Veh. Code, § 10851, subd. (a).) Zuniga admitted suffering the prior strike conviction and serving the prior prison terms. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), & 667.5, subd. (b).) The trial court sentenced him to a prison term of six years.

Zuniga appeals and contends that the trial court erred by instructing with CALJIC No. 2.52 ("Flight After Crime") and CALJIC No. 2.15 ("Possession of Stolen Property"). He argues that the erroneous instructions are prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836, because the prosecution's case was "marginal."

DISCUSSION

I.

Zuniga contends that insufficient evidence supports the attempted flight instruction (CALJIC No. 2.52) because there is no evidence that he attempted to flee the police officers. (*People v. Crandell* (1988) 46 Cal.3d 833, 869-870, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 [general discussion of evidence supporting CALJIC No. 2.52].) He points out that he "look[ed] around" as the police officers, with guns drawn, ordered him to lie on the ground, but he did not attempt to run. Zuniga asserts that his statement that he contemplated "jumping the fence" does not support the instruction.

Over defense objection, the trial court instructed: "The attempted flight of a person after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." Section 1127c requires the trial court to instruct regarding flight "where evidence of flight is relied upon as tending to show guilt." (*People v. Carter* (2005) 36 Cal.4th 1114, 1182.)

The trial court erred in giving this instruction. Zuniga was "looking around" when he realized that police officers had blocked his path. This does not support giving this instruction to the jury. Police officers were yelling at him to get down. Under these circumstances, looking around but not running, does not evidence flight or attempted flight. It is true that later in a conversation with Ledesma in the patrol car, Zuniga stated that he thought about jumping the fence. We agree with Zuniga that these later expressed thoughts do not establish flight. Thoughts are of a far different character than deeds.

We agree, however with the People that Zuniga was not unduly prejudiced. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Had the trial court not instructed with CALJIC No. 2.52 the jury could have drawn a common-sense inference of consciousness of guilt from Zuniga's behavior and his statements made in the patrol car. (*People v. Moon* (2005) 37 Cal.4th 1, 28; *People v. Crandall, supra,* 46 Cal.3d 833, 870.)

II.

Zuniga argues that the trial court erred by instructing with CALJIC No. 2.15, regarding possession of stolen property, because the prosecutor withdrew his request for the instruction, the instruction is an improper pinpoint instruction, and the instruction permitted the jury to ignore Ledesma's testimony that he alone stole the station wagon. Zuniga contends that the instruction denies him due process of law because it provided a "shortcut" to conviction.

The trial court instructed: "If you find that a defendant was in possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime charged. Before guilt may be inferred there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. As corroboration you may consider the attributes of possession, time, place and manner that the defendant had an opportunity to commit the crime charged, the defendant's conduct, any statement defendant may have made with reference to the property, or any other evidence which tends to connect the defendant with the crime charged."

For several reasons, we reject Zuniga's argument. First, the record is not clear whether the prosecutor withdrew his request for the instruction or for the word "conscious" in the phrase "in [conscious] possession of recently stolen property." The trial court and the prosecutor followed the instruction use note and agreed that the word "conscious" was unnecessary given Zuniga's knowing control over the station wagon.

Second, CALJIC No. 2.15 rests upon a long-standing rule that permits a jury to find guilt when the defendant is in possession of recently stolen property,

combined with slight corroborating evidence tending to prove guilt. (*People v. Barker* (2001) 91 Cal.App.4th 1166.) Our Supreme Court has approved the instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 677; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Third, the instruction is cautionary and inures to a defendant's benefit by warning the jury not to infer guilt from the defendant's possession of stolen property alone. (*People v. Barker, supra,* 91 Cal.App.4th 1166, 1174.) It does not compel the jury to draw the inference of theft from the possession of stolen property. The instruction also comports with due process unless "there is no rational way for the jury to make the logical connection which the presumption permits." (*Ibid.*) Moreover, the instructions here properly instructed regarding the elements of the crime (CALJIC No. 14.36 [unlawful vehicle taking]), burden of proof (CALJIC No. 2.90), consideration of the instructions as a whole (CALJIC No. 1.01), and credibility of witnesses (CALJIC No. 2.20). (*People v. Holt, supra,* 15 Cal.4th 619, 677 [CALJIC No. 2.15 not considered in isolation].) There is no possibility the jury would have understood that CALJIC No. 2.15 relieved it of considering the evidence as a whole and determining the elements of unlawful vehicle taking beyond a reasonable doubt. (*Ibid.)*

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Glen Reiser, Judge

Superior Court County of Ventura

Robert H. Pourvali, under appointment by the Court of Appeal, for Defendant and Appellant.

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